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No. 01-432

IN THE

Supreme Court of the United States

CONSOLIDATED FREIGHTWAYS, INC., *et al.*,

Petitioners,

v.

LLOYD W. CRAMER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents submit that the real issues for review are as follows:

1. Whether the 10-1 decision by the *en banc* panel of the Ninth Circuit Court of Appeals correctly held that the federal Labor Management Relations Act, 29 U.S.C. § 185, does not preempt state lawsuits by union employees seeking damages and injunctive relief arising from their employer's illegal use of hidden surveillance and eavesdropping devices in employee restrooms, when such conduct clearly violates no fewer than four state criminal statutes?

2. Can a collective bargaining agreement be interpreted to allow conduct by an employer that violates independent state criminal law?

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Respondents in *Cramer v. Consolidated Freightways* and *Alfaro v. Consolidated Freightways* submit the following **joint** Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner Consolidated Freightways.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Consolidated Freightways seeks to hide behind the shield of federal preemption to escape liability for its corporate criminal acts. Petitioner's brief incorporates virtually the same arguments it attempted to unsuccessfully advance in the Ninth Circuit Court of Appeals. The *en banc* panel of the Court of Appeals rejected those arguments in a 10-1 decision, and numerous other circuits of the Court of Appeals have rejected similar arguments in other cases. This Court should reject those arguments as well, and it should deny the instant Petition for Writ of Certiorari. (All references by Respondents in this Opposition Brief will be to those contained in Petitioner's Appendix).

Petitioner Consolidated Freightways ("Petitioner" or "Consolidated Freightways") installed hidden, illegal surveillance and eavesdropping devices in restrooms at its commercial trucking terminal in Mira Loma, California. These hidden surveillance and eavesdropping devices violate at least four sections of the California *Penal Code*: § 653n (prohibits use of two way mirrors in bathrooms); § 647(k) (prohibits using holes or cameras to look into bathrooms); § 632 (prohibits recording confidential communications); and § 635 (prohibits possession of eavesdropping devices). California law provides a private right of action for violation of Penal Code §§ 632 and 635, and California's Constitution and common law provide a private right of action for violation of the right to privacy.

Respondents are employees and others lawfully using the commercial trucking terminal operated by Petitioner, and they brought these lawsuits in California courts alleging only California causes of action. The claims of the Respondents do

not arise from or depend on the terms of a collective bargaining agreement.

This case presents the issue of whether the California state lawsuits filed by the victims of these crimes are preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"). The *en banc* panel of the Ninth Circuit Court of Appeals correctly held that the LMRA does not preempt these lawsuits because the actions of Petitioner Consolidated Freightways are clear violations of California law. Appendix at 18a-19a. The Ninth Circuit concluded that the collective bargaining agreement cannot allow conduct that is illegal under state law, so there is no need to "interpret" the collective bargaining agreement to see if the conduct was allowed by its terms. Appendix at 19a. Consequently, the action is "independent" of the collective bargaining agreement and is, therefore, not preempted. The Ninth Circuit's decision in this case follows all relevant Supreme Court precedent and does not conflict with decisions from other circuits.

The Supreme Court has repeatedly held that § 301 of the LMRA does not grant the parties to a collective bargaining agreement the ability to negotiate or contract for conduct that is illegal under state law. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). States may provide substantive rights to workers without regard to the collective bargaining agreement, and state law claims seeking to vindicate those rights will be preempted only if it "requires the interpretation of a collective bargaining agreement." *Lingle v. Norge*, 486 U.S. 399 (1987).

The Court of Appeals in various circuits have followed the clear rule from the Supreme Court and have held that lawsuits arising out of unlawful activities by employers are not preempted. *See Griess v. Consolidated Freightways*,[1] 882 F.2d

1. Ironically, a number of the published cases in this area are decided against Consolidated Freightways. In at least three published (Cont'd)

461 (10th Cir. 1989); *Kohl's Food Stores v. Hyland*, 32 F.3d 1075 (7th Cir. 1994); *Knafel v. Pepsi Cola*, 899 F.2d 1473 (6th Cir. 1990); *Peterson v. BMI Refractories*, 132 F.3d 1405 (11th Cir. 1998). Contrary to the assertions by Petitioner, other circuits have held that state privacy rights lawsuits are not preempted when the actions by the employer are prohibited by state law, so the Ninth Circuit's opinion does not create a conflict between the circuits. *See Schmidt v. Ameritech*, 115 F.3d 501 (7th Cir. 1997); *Keehr v. Consolidated Freightways*, 825 F.2d 133 (7th Cir. 1987).

STATEMENT OF THE CASE

A. Background Facts about the Actions Alleged in the Complaint

In September of 1997, an employee of Consolidated Freightways discovered by chance that Consolidated Freightways had installed a surveillance camera in a hole in the wall behind a two-way mirror in the men's restroom at its trucking terminal in Mira Loma, California. (Alfaro ER tab 2, page 2.)[2] The mirror shifted after the employee closed the door, and the employee was straightening the mirror when it fell off

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(Cont'd)
cases, Consolidated Freightways has attempted to escape state liability for its wrongful acts based on the argument that the claims were preempted by federal law. The Court of Appeals in three different circuits have rejected that argument. Nevertheless, Consolidated Freightways continues to make the same argument in this case without bothering to cite to the controlling authority previously decided against it. *See Griess v. Consolidated Freightways*, 882 F.2d 461 (10th Cir. 1989); *Parten v. Consolidated Freightways*, 923 F.2d 580 (8th Cir. 1991); *Keehr v. Consolidated Freightways*, 825 F.2d 133 (7th Cir. 1987).

2. This appeal involves two separate but related cases that were joined for appeal. There are two separate sets of excerpts of record. In this brief, excerpts of record from *Cramer v. Consolidated Freightways* are referred to as "Cramer ER", and excerpts of record from *Alfaro v. Consolidated Freightways* are referred to as "Alfaro ER".

the wall, revealing the hidden camera. (Alfaro ER tab 2, page 2.) Employees subsequently discovered that an identical hole was cut into the wall behind the mirror of the adjoining women's restroom. (Alfaro ER tab 15, page 3.) The camera was installed so that it faced out into the restroom and photographed all users of the restroom. Discovery in the case has disclosed that two additional cameras and a microphone were hidden in the ceiling of another men's restroom at the facility.

Employees immediately called the Riverside County Sheriff's Department, which came out to investigate the crime and confiscated three cameras from two men's restrooms as well as additional electronic recording equipment. (Alfaro ER tab 9, page 4.) The Sheriff's deputies confiscated cameras that were hidden behind a two-way mirror and in fire sprinklers in the ceilings of the restrooms. (Alfaro ER tab 9, page 4.)

The restrooms in question are used by Consolidated's approximately 700 employees who work at that facility. (Alfaro ER tab 9, page 4.) They are also used by an unknown number of invitees of the facility, including private security guards, family members of employees, delivery persons, and non-employee truckers who use the terminal. (Alfaro ER tab 9, page 4.)

Discovery in this case and related cases has shown that at least one of the cameras pointed at a urinal in the men's restroom. Consolidated Freightways produced 141 surveillance videotapes during discovery, and those videotapes include hundreds of scenes of men using urinals. Indeed, this should not be a disputed point because Consolidated Freightways's human resources manager Mark Epstein has testified at deposition that the cameras showed urinals, and that he watched them both live and on videotape.[3]

3. Curiously, Petitioner Consolidated Freightways misleadingly asserts in its Petition that "video cameras were directed away from the (Cont'd)

The illegal surveillance devices were all hidden, many in elaborately crafted hiding places. In order to keep the installation secret from the accounting staff at the facility, Consolidated Freightways arranged to have the camera installation company send false invoices for innocuous tasks such as changing lightbulbs. To keep this charade alive, Consolidated Freightways never used videotape evidence in any grievance or disciplinary actions, because doing so would reveal the existence of the cameras. Employees at the trucking terminal were not aware of the installation of these cameras until they were discovered on the night that the Sheriff's Department confiscated the equipment.

B. Procedural History of the Case and the *En Banc* Decision by the Ninth Circuit

Based on these facts, Respondents/Plaintiffs joined together to file a series of lawsuits against Consolidated Freightways in California Superior Court. On October 7, 1997, 282 of the employees joined together to file an action titled *Alfaro v. Consolidated Freightways*. (Alfaro ER tab 1.) The *Alfaro* action alleges six causes of action based on California law, namely: (1) Violation of California's Constitutional Right to Privacy; (2) Violation of California *Penal Code* § 632 (prohibits the use of electronic eavesdropping equipment); (3) Injunctive Relief; (4) Intentional Infliction of Emotional Distress; (5) Negligent Infliction of Emotional Distress; and (6) Violation of California *Penal Code* § 635 (prohibits the possession or installation of eavesdropping equipment). On September 29, 1997, another group of employees and others joined together to file a class-

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(Cont'd)
urinals . . . and that no one was ever videoed while actually using those facilities . . ." Petition at 6. Inexplicably, Petitioner has consistently misrepresented these facts to the courts notwithstanding overwhelming testimonial and documentary evidence to the contrary, including deposition testimony of its own managers and hundreds of hours of videotapes showing urinals and the users of those urinals.

action lawsuit titled *Cramer v. Consolidated Freightways* in the California Superior Court. (Cramer ER 1.) The Cramer action was based on a single cause of action for breach of California's constitutional right to privacy.

Both the *Cramer* and *Alfaro* lawsuits were immediately removed to U.S. District Court by Consolidated Freightways — even before any discovery was done and before Consolidated Freightways filed an Answer. Both lawsuits were dismissed by the District Court on the ground that they were preempted by the LMRA. Appendix at 72a and 79a. Plaintiffs in both actions appealed to the U.S. Court of Appeals for the Ninth Circuit. Initially, a three-judge panel of the Ninth Circuit affirmed the District Court's decision in a 2-1 opinion. Appendix at 35a. Upon reconsideration, an 11-judge *en banc* panel of the Ninth Circuit reversed the District Court in a 10-1 decision.

The *en banc* panel of the Ninth Circuit reviewed all of the relevant U.S. Supreme Court precedent and concluded that Respondents' state lawsuits were not preempted. The *en banc* panel held that Petitioner's conduct at issue in this lawsuit was illegal: "Section 653n of the California Penal Code makes the installation and maintenance of two-way mirrors permitting the observation of restrooms illegal without reference to the reasonable expectations of those so viewed . . . use of the mirrors is a per se violation of the penal code". Appendix at 18a.

The majority opinion then states that "Under settled Supreme Court precedent '§ 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law'." Appendix at 19a. Therefore, "Because installation of two-way mirrors is immutably illegal, and freedom from the illegality is a 'nonnegotiable state law right', a court reviewing plaintiffs' claims that their privacy rights were violated need not interpret the CBA to arrive at its conclusion." Appendix at 19a. Accordingly, the 10-judge majority concluded that the state law claims of the Respondents in this action are not preempted by the LMRA.

Judge O'Scannlain filed the lone dissent that was not joined by any of the other 10 judges on the *en banc* panel. Judge O'Scannlain agreed with the majority that the collective bargaining agreement was "silent . . . on whether Consolidated's precise behavior is allowed". Appendix at 27a. But Judge O'Scannlain believed that the collective bargaining agreement's silence should be treated as an implied waiver of state criminal laws regarding placement of cameras in bathrooms. Appendix at 28a. Thus, the major distinction between the majority opinion and the solo dissent of Judge O'Scannlain involves an interpretation of California law about whether silence can be interpreted as a waiver of state criminal law protection.

REASONS FOR DENYING THE WRIT

I.

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE NINTH CIRCUIT'S OPINION FOLLOWS SUPREME COURT PRECEDENT THAT A COLLECTIVE BARGAINING AGREEMENT CANNOT ALLOW CONDUCT THAT IS ILLEGAL UNDER STATE LAW

In its *en banc* decision, the Ninth Circuit followed controlling precedent from the United States Supreme Court that a collective bargaining agreement cannot allow conduct that is illegal under state law. In 1985, the United States Supreme Court decided the case of *Allis-Chalmers Corp. v. Lueck*, and it is this case that provides the framework for deciding whether the LMRA preempts state lawsuits arising out of illegal conduct by an employer. 471 U.S. 202 (1985). In *Allis-Chalmers*, the Supreme Court held that:

> Clearly, § 301 [of the Labor Management Relations Act] does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law.

471 U.S. 202, 212 (1985).

In 1988, the Supreme Court revisited the subject of LMRA preemption in its *Caterpillar v. Williams* decision. 482 U.S. 386 (1987). In that case, the Court quoted from its earlier *Allis-Chalmers* decision and stated that "it would be inconsistent with congressional intent under [§ 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of the labor contract." 482 U.S. at 395.

The *Caterpillar* decision went on to examine this subject in more length in footnote ten at page 396. In that footnote, the Court stated that "Claims bearing no relationship to a collective bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not pre-empted by § 301." The *Caterpillar* Court then quoted in the same footnote from its earlier case of *Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 25 n.28 (1983):

> Even under § 301 we have never intimated that any action merely relating to a contract within the coverage of § 301 arises exclusively under that section. For instance, a state battery suit growing out of a violent strike would not arise under § 301 simply because the strike may have been a violation of an employer-union contract.

These Supreme Court cases, when taken together, stand for a very simple rule: parties to a collective bargaining agreement cannot agree to allow conduct that is illegal under state law. Indeed, this rule is not unique in the context of LMRA preemption. The Supreme Court has repeatedly stated the rule in other contexts. For example, in *Burundian v. Arkansas-Best Freight Systems*, 450 U.S. 728 (1981), the Supreme Court held that the Fair Labor Standards Act takes precedence over conflicting provisions in a collective bargaining agreement. Likewise, in *United Mine Workers v. Pennington*, the Court held that the terms of a collective bargaining agreement may not "disregard other laws." 381 U.S. 657 (1965).

The Ninth Circuit was well aware of this controlling law. The majority decision in this case cites to the rule from *Allis-Chalmers* that "§ 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." Appendix 19a. The Ninth Circuit's opinion, relying on the rule from *Allis-Chalmers*, stated that "Consolidated was therefore required to abide by the provisions of California penal law, and its employees had a right to assume their employer would obey the law . . . Even if the CBA purported to reduce or limit this expectation in some way, that reduction would be illegal and therefore unenforceable."[4] Appendix 19a.

Consolidated Freightways attempts to argue in its Petition for Writ of Certiorari that the Ninth Circuit was wrong because the legality of its actions cannot be determined without reference to the collective bargaining agreement. That argument is simply wrong. The actions of Consolidated Freightways are an obvious violation of California law, and there is no reason to interpret the collective bargaining agreement to determine the legality of Consolidated's actions. As the Ninth Circuit concluded, "installation of two-way mirrors is immutably illegal." Appendix at 19a. The eavesdropping and surveillance activities done by Consolidated Freightways in this case are illegal under California state law and are specifically prohibited by at least four separate sections of the California *Penal Code,* including the following sections:

> a. **California *Penal Code* § 653n.** Section 653n makes it a misdemeanor to install or maintain a two-way mirror in a bathroom, to wit:

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4. In that regard, the Ninth Circuit cited to both federal and state law. California follows the common law rule that illegal contracts are void and unenforceable. California has codified this rule in several of its *Civil Code* sections, including §§ 1668, 1598, 1599, 1608, and 1667. Under California law, any portion of a contract that attempted to allow illegal conduct would be void.

Any person who installs or who maintains after April 1, 1970, any two-way mirror permitting observation of any restroom, toilet, bathroom, washroom, shower, locker room, fitting room, motel room, or hotel room, is guilty of a misdemeanor.

b. **California *Penal Code* § 647(k).** Section 647(k) makes it a misdemeanor to engage in certain specified acts, including:

Anyone who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including but not limited to, a periscope, telescope, binoculars, camera, or camcorder, the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside.

c. **California *Penal Code* § 632.** Section 632 makes it illegal to eavesdrop or record confidential communications by means of electronic recording or amplification devices. The Complaint alleges that Consolidated Freightways used hidden surveillance devices to listen to and record employee communications in the bathrooms and in other areas. (Alfaro ER, tab 1.) Under case law, the statute prohibits both audio and video recording of communications. *People v. Gibbons*, 215 Cal.App. 3d 1204, 263 Cal. Rptr. 905 (1990) [Secret videotaping of sexual acts without sound violates the statute].

d. **California *Penal Code* § 635.** Section 635 makes it illegal to possess or sell eavesdropping devices, such as the ones used for activities outlawed in *Penal Code* § 632.

Petitioner's violations of these statutes in the present case are obvious. In an effort to shift attention away from its criminal acts, Petitioner mistakenly argues that the lawsuit should be preempted because the Court is required to interpret the collective bargaining agreement to determine whether the employees had an expectation of privacy while using the restroom. Petitioner hopes by this circular argument to escape liability for its corporate criminal acts.

Unfortunately for Petitioner, its argument ignores the fact that California's courts have held that the state's constitution and criminal law provide users of a restroom with a reasonable expectation of privacy *as a matter of law*. There is simply no need to interpret a collective bargaining agreement to determine whether Petitioner's actions violated state criminal law.

California *Penal Code* §§ 653n and 647(k) outlaw specified types of surveillance in bathrooms *regardless* of whether there is a determination of an expectation of privacy. The explicit language of § 653n makes no mention about a "reasonable expectation of privacy". The statute simply outlaws the use of two-way mirrors in certain locations. Indeed, cases interpreting § 653n have concluded that its very enactment indicates a public policy that there is a reasonable expectation of privacy in a restroom. For example, in *People v. Metcalf*, the California Appellate Court held that "the enactment of [Penal Code] section 653n enunciates a public policy against clandestine observation of public restrooms and renders it reasonable for users thereof to expect that their privacy will not be surreptitiously violated." 22 Cal. App. 3d 20, 23-24, 98 Cal. Rptr. 925 (1971). As the Ninth Circuit concluded,

> Section 653n of the California Penal Code makes the installation and maintenance of two way mirrors permitting the observation of restrooms illegal without reference to the reasonable expectation of those so viewed. Determination of guilt under the

> statute is not dependent on context or subjective factors; use of the mirrors is a per se violation of the penal code . . .

Appendix at 18a.

Thus, neither California *Penal Code* §§ 647(k) nor 653n requires an inquiry into whether Respondents' expectation of privacy in a restroom was reasonable. Even if such an analysis were necessary under those statutes, California case law is clear that the expectation of privacy that people have in a restroom is reasonable as a matter of law. In *People v. Triggs*, the California Supreme Court held that "[t]he expectation of privacy a person has when he enters a restroom is reasonable . . ." 8 Cal. 3d 884, 891, 106 Cal. Rptr. 408, 412 (1973), *disapproved on another point in People v. Lilienthal*, 22 Cal. 3d 891, 896 n.4, 150 Cal. Rptr. 910 n.4 (Cal. 1978). Likewise, in *People v. Metcalf*, the California Appellate Court held that it is "reasonable for users thereof [of a bathroom] to expect that their privacy will not be surreptitiously violated." 22 Cal. App. 3d 20, 23-24, 98 Cal. Rptr. 925 (1971). *See also Young v. Superior Court of Tulare County*, 57 Cal. App. 3d 883, 887, 129 Cal. Rptr. 422, 425 (1976) ("An occupant of a closed bathroom, the same as an occupant of a closed bedroom, is entitled to an expectation of privacy far greater than those persons in the common areas of a house . . .").

Based on these California authorities, the Ninth Circuit concluded that there would be no reason to interpret the collective bargaining agreement to determine whether the employees had a reasonable expectation of privacy. The Ninth Circuit cited to *Allis-Chalmers* and then held that the LMRA does not preempt the instant lawsuit because it arises from the violation of the state criminal laws by the employer. As such, no possible interpretation of the collective bargaining agreement could allow conduct that is criminal under state law. Because there is no reason to interpret the collective bargaining agreement to determine if the illegal conduct is allowed, the state lawsuit

is "independent" of the collective bargaining agreement and is not preempted. Appendix at 21a. This holding is entirely consistent with Supreme Court authority and does not create conflict with other circuits.

II.

RESPONDENTS' INDEPENDENT ACTIONS UNDER STATE LAW ALLEGING ONLY STATE CAUSES OF ACTION ARE NOT PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT

Respondents in these cases brought independent actions in California courts alleging only California causes of action unrelated to the collective bargaining agreement. These actions are independent of the collective bargaining agreement because they can be resolved by reference only to California state law, and they should not be preempted.

The federal LMRA only preempts state law causes of action that are "substantially dependent" on analysis of a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). If a state cause of action is not "substantially dependent" on a collective bargaining agreement, then the state case is *not* preempted and there is no federal subject matter jurisdiction. As the Supreme Court wrote in *Caterpillar*, ". . . a plaintiff covered by a collective bargaining agreement is permitted to assert legal rights *independent* of the agreement . . ." 482 U.S. at 396. (Emphasis in original).

But what is meant by "independent" rights? The Supreme Court has addressed that issue in a number of cases. In *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1987), the Court wrote that "independent" means that "resolution of the state-law claim does not require construing the collective bargaining agreement." 486 U.S. at 407. In that case, the Court was faced with a plaintiff who was subject to a collective bargaining agreement that provided for arbitration of termination issues,

but the plaintiff chose instead to file a state-law wrongful termination claim. The Court allowed the plaintiff to pursue his state law cause of action for wrongful termination, holding that the claim was not preempted by the LMRA for the following reason:

> [E]ven if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claims can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 preemption purposes.

Id. at 409-410.

The Supreme Court visited this same issue again in *Livadas v. Bradshaw*, 512 U.S. 107 (1994). In *Livadas*, the Court stated that ". . . when the meaning of contract terms [i.e. collective bargaining agreement terms] is not the subject of dispute, the bare fact that a collective bargaining agreement will be consulted in the course of state law litigation plainly does not require the claims to be extinguished." *Id.* at 124.

In this case, Respondents filed actions that are "independent" under California law and require no reference to the collective bargaining agreement. Both the *Cramer* and *Alfaro* Plaintiffs/Respondents filed causes of action for violation of the right to privacy found and explicitly guaranteed in the California Constitution. The *Alfaro* Plaintiffs/Respondents also brought causes of action for violation of California *Penal Code* §§ 632 and 635. (Alfaro ER, Tab 1.) California *Penal Code* § 637.2 gives a private, civil right of action for violation of California *Penal Code* §§ 632 and 635.

California's protection of privacy rights is long-standing and firm. In 1967, California's Legislature explained in *Penal Code* § 630 its policy reasons for enacting certain *Penal Code*

provisions protecting privacy (including §§ 632 and 635, which are at issue in this case):

> The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society. The Legislature by this chapter intends to protect the right of privacy of the people of this state.

California's Constitution contains an explicit guarantee of the right to privacy. This right to privacy was added to Article 1, § 1 of the California Constitution by statewide initiative in 1972. The privacy rights protections covered by the California Constitution were motivated by "the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." *White v. Davis*, 13 Cal. 3d 757, 773-774, 120 Cal. Rptr. 94, 105 (1975). Unlike federal constitutional privacy rights, the privacy rights in the California Constitution apply to both private and governmental intrusions on privacy. *Hill v. NCAA*, 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834 (1994). Violations of the constitutional right to privacy may be enforced with actions for damages or injunctive relief. *White v. Davis*, 13 Cal. 3d 757, at n.8.

As part of its long-standing commitment to privacy rights, California allows private lawsuits for violation of privacy rights. Within the past decade, California's Supreme Court has decided two cases that clearly and unambiguously set forth the elements of a cause of action for violation of the constitutional right to privacy. *Hill v. NCAA*, *supra.*, 7 Cal. 4th at 34-38, 26 Cal. Rptr. 2d at 856-857; *Loder v. City of Glendale*, 14 Cal. 4th 846, 896,

59 Cal. Rptr. 2d 696, 728 (1997). Under *Hill* and *Loder*, all of the elements of a cause of action for violation of the California state right to privacy can be shown without reference to the collective bargaining agreement. The *Hill* case holds that "the observation of urination — a human excretory function — obviously implicates privacy interests." *Hill*, *supra* at 41. Urination, and presumably other excretory functions, involve legally-protected privacy rights whether or not they are directly observed. *Loder*, *supra*, 14 Cal. 4th at 896. As discussed in detail in section I of this brief, California's courts have repeatedly held that users of a restroom — even a public restroom — have a reasonable expectation of privacy. *See People v. Triggs*, *supra*, 8 Cal. 3d at 891.

In order to escape the obvious fact that Respondents' state law claims do not require any reference to the collective bargaining agreement, Petitioner Consolidated Freightways mistakenly argues that the California state law claims should be preempted because their *defense* might involve interpretation of the collective bargaining agreement. Such an argument was rejected by the Ninth Circuit in its *en banc* decision (Appendix at 17a), and it has been repeatedly and decisively rejected by the U.S. Supreme Court. In *Caterpillar v. Williams*, the Supreme Court held that

> it is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

482 U.S. at 393. *Caterpillar* went on to hold that

> [A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in

> which the claim shall be litigated . . . Congress has long since decided that federal defenses do not provide a basis for removal.

Id. at 399.

The Ninth Circuit correctly recognized that Respondents' state law claims are based on "constitutional and statutory rights of privacy guaranteed to all persons, whether or not they happen to work subject to a [collective bargaining agreement]" and are, thus, independent of the collective bargaining agreement. Appendix at 16a. California law is sufficiently developed that Respondents will be able to satisfy and prove their privacy rights causes of action without reference to the collective bargaining agreement, so these actions are "independent" and are not preempted by the LMRA.

III.

THE NINTH CIRCUIT'S OPINION IN THIS CASE FOLLOWS SUPREME COURT PRECEDENT THAT WAIVERS OF STATE RIGHTS MUST BE "CLEAR AND UNMISTAKABLE"

Petitioner argues that interpretation of the collective bargaining agreement is required to determine if Respondents waived their privacy protections of the California *Penal Code*. That argument is wrong because Supreme Court cases have made it clear that waivers of state law rights in a collective bargaining agreement must be "clear and unmistakable". In the present case, even a cursory look at the collective bargaining agreement shows that it is silent on the subject of placement of cameras in violation of state laws, so there is no "clear and unmistakable" waiver of privacy rights in this case.

The "clear and unmistakable" test comes from a series of United States Supreme Court cases over the past two decades. In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), the Supreme Court held that waivers of state law rights under a

collective bargaining agreement must be "clear and unmistakable". This same language was later quoted and followed by the Supreme Court in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 409-410 n.9 (1987), *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994), and, most recently, in *Wright v. Universal Maritime Service*, 525 U.S. 70 (1998).

In *Livadas*, the Supreme Court was faced with a case in which it was argued that an employee had bargained away certain protections in the California *Labor Code* by becoming a member of a collective bargaining agreement. The Supreme Court disagreed, and stated that:

> There is no suggestion here that [the employee's] union sought or purported to bargain away her protections under [California *Labor Code*] § 201 or § 203, a waiver that we have held would . . . have to be "clear and unmistakable" [citations omitted] for a court even to consider whether it could be given effect . . .

512 U.S. at 125.

The Ninth Circuit's *en banc* panel followed this "clear and unmistakable" rule when dealing with waiver arguments advanced by Petitioner. Appendix 13a. Petitioner claims that two provisions of the collective bargaining agreement act as a waiver of state law surveillance rights: Article 35, which deals with drug testing but does not contain one word on the use or placement of cameras (whether hidden or not), and Article 26, which contains a procedural rule dealing with use of videotape evidence at grievance hearings but is silent on the placement of cameras.

However, as the Ninth Circuit concluded, even a "cursory examination of those provisions makes clear they apply to a completely different context and set of circumstances."

Appendix 16a.[5] The Ninth Circuit concluded that neither of the two provisions raised by Petitioner "purports to have any bearing on secret spying on Consolidated's employees in company restrooms". Appendix 16a. As Ninth Circuit Judge Fisher stated: "[T]he collective bargaining agreement ("CBA") in question does not discuss — even implicitly — surreptitious surveillance of restrooms . . ." Appendix 63a. Indeed, even the sole dissenting Ninth Circuit judge agreed that the collective bargaining agreement is "silent" on the subject of placement of cameras. Appendix at 27a.

Assuming, arguendo, that the two cited provisions could possibly be construed as an attempted waiver of state law protections, such a waiver would be invalid under California law. Under California law, a person can waive a law "intended solely for his benefit" but cannot waive a law "established for a public reason". California *Civil Code* § 3513. California's courts have held that penal statutes "are conclusive evidence that the prohibited acts would be against the public interest" and are, thus, not waivable. *De Haviland v. Warner Bros. Pictures*, 67 Cal. App. 2d 225, 236, 153 P.2d 983 (Cal. Ct. App. 1944). *See also Berka v. Woodward*, 125 Cal. 119, 57 P. 777 (1899); *Benane v. International Harvester Company*, 142 Cal. App. 2d Supp. 874, 299 P.2d 750 (1956); *Western Surgical Supply v. Affleck*, 110 Cal. App. 2d 388, 242 P.2d 929 (Cal. Ct. App. 1952). Even if the criminal statutes at issue were waivable in California (which they are not), waiver is only valid under California law if it is the "intentional relinquishment or abandonment of a known right". *Bickel v. City of Piedmont*, 16 Cal. 4th 1040, 946 P.2d 427 (1997).

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5. Under well-settled law, a court is allowed to examine a collective bargaining agreement to determine if the claims are preempted without actually "interpreting" the agreement. *See Livadas v. Bradshaw, supra*, 512 U.S. at 125; *Milne Employees Association v. Sun Carriers*, 960 F.2d 1401, 1410-11 (9th Cir. 1991).

In the present case, there was no waiver under California law because the employees did not know about the surveillance, and, as such, there was no "intentional relinquishment or abandonment" of the *Penal Code* protections. As Judge Fisher noted, "Indeed, the surreptitious nature of the violation of plaintiffs' privacy belies any notion of bargaining or consent to hidden cameras behind two-way mirrors." Appendix at 16a.

Based on these facts, the Ninth Circuit concluded that there was no "clear and unmistakable" waiver of state criminal laws by Respondents. This holding is completely in keeping with all relevant Supreme Court precedent, and it follows California state law on the subject of waiver of penal code protections.

IV.

THE NINTH CIRCUIT'S OPINION IN THIS CASE DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

A. Other Circuits Hold that Lawsuits Arising out of Activities that violate State Law are Not Preempted.

The Ninth Circuit's *en banc* opinion in this case is entirely consistent with the oft-repeated rule from other circuits that the LMRA does not preempt state lawsuits arising from activities prohibited by state law.

As discussed earlier, the Supreme Court has repeatedly held that parties to a collective bargaining agreement cannot contract for conduct that is illegal under state law. Therefore, lawsuits alleging illegal or prohibited behavior by an employer do not require interpretation of a collective bargaining agreement and are not preempted by the LMRA. This simple rule has been followed in all of the circuits, and the following cases from various of the circuits are illustrative of this rule:

• *Peterson v. BMI Refractories*, 132 F.3d 1405 (11th Cir. 1998). In this case, a union employee sued his employer for

assault, battery, outrage (infliction of emotional distress), and discrimination. The Eleventh Circuit held that the lawsuit was not preempted because the right of an employee to be free from criminal acts is nonnegotiable and does not require interpretation of a collective bargaining agreement.

• *Kohl's Food Stores v. Hyland*, 32 F.3d 1075 (7th Cir. 1994). In this case, a union employee brought an action against his employer for refusing to reinstate him to a job in violation of Wisconsin law. The Seventh Circuit held that the state lawsuit was not preempted because the employer's actions were illegal under Wisconsin law.

• *Knafel v. Pepsi Cola*, 899 F.2d 1473 (6th Cir. 1990). In this case, a union employee brought an action against her employer alleging wrongful termination and emotional distress after she was fired for making an EEOC complaint and for filing an Ohio workers' compensation claim. The Sixth Circuit cited to *Allis-Chalmers* and held that the action was not preempted because both federal law and Ohio law prohibited retaliatory firing by an employer, and resolution of the Ohio state claim did not require interpretation of a collective bargaining agreement.

• *Griess v. Consolidated Freightways*, 882 F.2d 461 (10th Cir. 1989). In this case, a union employee sued his employer for retaliatory firing after he filed a workers' compensation claim. The Tenth Circuit held that retaliatory firing is prohibited by Wyoming law, so the state lawsuit is not preempted.

• *Owen v. Carpenter's Council*, 161 F.3d 767 (4th Cir. 1998). In this case, a union employee sued her employer alleging firing after she reported sexual harassment. The Fourth Circuit held that Maryland law does not allow discrimination for reporting sexual harassment, so her state lawsuit is not preempted.

• *Ralph v. Lucent*, 135 F.2d 166 (1st Cir. 1998). In this case, a union employee sued under the federal Americans with

Disabilities Act and Massachusetts handicap discrimination statute. The First Circuit held that handicap discrimination is barred by clear Massachusetts law without reference to the collective bargaining agreement, so the state lawsuit was held not preempted.

• *Anderson v. Ford Motor Company*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011. In this case, union workers brought a state action against their employers for fraud and contract claims. The Eighth Circuit cited to *Allis-Chalmers*, and concluded that the actions were not preempted because "Fraud is a common law tort deeply rooted in local standards of individual and social responsibility." *Id.* at 957.

The cases listed above are only a small sampling of the published Court of Appeals cases on the subject.[6] The published cases show that the various circuits of the Court of Appeals have adopted a rule that lawsuits arising out of prohibited activity by an employer are not preempted if the state has clearly prohibited the activity through its statutes or case law. Thus, dozens of published cases show that the different circuits of the Court of Appeals have held that lawsuits involving such prohibited actions as retaliatory discharge, fraud, discrimination, and assault are not preempted.

The Ninth Circuit's *en banc* decision in this case is entirely in keeping with the line of authority cited above. In this case, the Ninth Circuit held that the activities by Consolidated Freightways were illegal and prohibited by California criminal

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6. Other cases with similar holdings include: *Bettis v. Oscar Mayer*, 878 F.2d 192 (7th Cir. 1989); *Smolarek v. Chrysler*, 879 F.2d 1326 (6th Cir. en banc, 1989), *cert. denied*, 493 U.S. 992; *Taggart v. Trans World Airlines*, 40 F.2d 269 (8th Cir. 1994); *Galvez v. Kuhn*, 933 F.2d 733 (9th Cir. 1991); *Miller v. AT & T*, 850 F.2d 543 (9th Cir. 1988); *Jimeno v. Mobil Oil*, 66 F.3d 1514 (9th Cir. 1995); *Martin Marrietta v. Maryland*, 38 F.3d 1392 (4th Cir. 1994); *Ramirez v. Fox Television*, 998 F.2d 743 (9th Cir. 1993); *Pennsylvania Nurses Association v. Pennsylvania State Education Association*, 90 F.3d 797 (3d Cir. 1996).

law. That decision follows a long line of Court of Appeals cases in similar situations, and it does not create any conflict between the circuits.

B. At least Two Other Published Cases Have Held that State Privacy Rights Lawsuits Arising out of Prohibited Conduct by an Employer are not Preempted.

Consolidated Freightways argues in its Petition that other decisions of other circuits have "uniformly" held that LMRA preempts privacy rights cases. Petition at 25. That is not true, and Consolidated Freightways should be well aware of that fact, because one of the published cases is against Consolidated Freightways. At least two published Court of Appeals cases have held that state privacy rights lawsuits arising out of prohibited conduct by an employer are not preempted by the LMRA.

In *Schmidt v. Ameritech*, the Seventh Circuit was faced with a state privacy rights lawsuit from a union employee of a telephone company who sued his employer for using confidential telephone records to investigate his disability leave. 115 F.3d 501 (7th Cir. 1997). In that case, the Court concluded that both state and federal law were violated by the employer: "We note in this connection that Illinois has recognized a distinct privacy right in one's telephone records based on Article I, Section 6 of the Illinois Constitution, which provides broader privacy protection than does the U.S. Constitution." *Id.* at 506. The Seventh Circuit held that the claim was not preempted because it depended on the "scope of Illinois privacy law" and not on the scope of the collective bargaining agreement. *Id.* at 505.

In *Keehr v. Consolidated Freightways*, the Seventh Circuit was faced with a privacy rights and infliction of emotional distress claim from an employee who alleged that his employer had made rude comments about his wife's sexual practices after a workplace argument. 825 F.2d 133 (7th Cir. 1987). A jury had found that the comments were "outrageous" and therefore

punishable under Indiana law. The Seventh Circuit concluded that the suit was not preempted because the actions were "outrageous".

Thus, contrary to the assertions by Consolidated Freightways in this case, there is no uniform rule against privacy rights cases in the Court of Appeals decisions. To the contrary, the cases all appear to follow the Supreme Court's rule that cases should be decided on a "case-by-case basis". *Allis-Chalmers Corp. v. Lueck, supra*, 471 U.S. at 220. In the two cases cited above, the employer's actions either violated state law or were "outrageous", so the state lawsuits were not preempted. These two cases are consistent with the Ninth Circuit's *en banc* decision in the present case, which held that the present lawsuit was not preempted after concluding that the actions by Consolidated Freightways were illegal under California law.

C. The Court of Appeals Cases Cited by Consolidated Freightways are Easily Distinguishable From this Case.

Consolidated Freightways attempts to manufacture a conflict between the circuits by citing to a series of privacy rights cases that it contends create a conflict between the circuits. However, all of the cases cited by Consolidated Freightways are easily distinguishable from this case because they do not involve employer conduct that is illegal.

In its Petition, Consolidated Freightways mistakenly claims that the Seventh Circuit's cases of *Brazinski v. Amoco Petroleum* and *In re Amoco Petroleum Additives Co.* are in conflict with the Ninth Circuit's opinion in this case. In fact, both *Brazinski* and *Amoco* are easily distinguishable from the present case, so they are not conflicting precedent.

Brazinski and *Amoco* are two opinions originating from the same case. *Brazinski v. Amoco Petroleum*, 6 F.3d 1176 (7th Cir. 1993); *In re Amoco Petroleum Additives*, 964 F.2d 706

(7th Cir. 1992). The case arose when Amoco Petroleum installed "a video camera in the ceiling of the entrance hallway, which enabled the firm to record who entered and left the locker room, and when, but not what they were doing inside." *Amoco*, 964 F.2d at 707. A lawsuit was brought against Amoco Petroleum under Illinois state law with causes of action for violation of privacy under Illinois common law and intentional infliction of emotional distress.

The *Brazinski/Amoco* cases are distinguishable from the present case because the *Brazinski* and *Amoco* cases did not involve criminal acts by the employer. Apparently Illinois has not chosen to criminalize the surveillance activities involved in that case. Indeed, the *Amoco* Court noted that "Plaintiffs concede that a collective bargaining agreement could authorize surveillance . . ." 964 F.2d at 706. In contrast, the actions of Consolidated Freightways in the present case are criminal and prohibited by California *Penal Code* §§ 632, 635, 647(k), and 653n. It is settled law that a collective bargaining agreement cannot authorize conduct that is illegal under state law, so the distinction between legal acts and illegal acts is vitally important to LMRA preemption analysis. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). In the present case, one of the central points in the Ninth Circuit's opinion is that the collective bargaining agreement *cannot* authorize the conduct at issue because it is criminal, and the Ninth Circuit realized that this was the critical distinction between the instant case and the Seventh Circuit's *Amoco* and *Brazinski* cases. Appendix at 17a n.6.

Consolidated Freightways also cites to a series of cases from other circuits holding that privacy rights cases are preempted, including *Jackson v. Liquid Carbonic*, 863 F.2d 111 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989); *Kirby v. Allegheny Beverage Corporation*, 811 F.2d 253 (4th Cir. 1987); and *Clark v. Newport News Shipbuilding*, 937 F.2d 934 (4th Cir. 1991). Each of those cases is easily distinguishable from the instant

case because each involved drug testing or searches of employees that were allowed by state law. In contrast, the instant case involves activity that is prohibited by the criminal laws of California.

For example, in *Jackson v. Liquid Carbonic, supra.*, the First Circuit dealt with a privacy rights claim from an employee who had tested positive for drug use. The First Circuit went through an exhaustive discussion about Massachusetts statutory and common law, concluding that "Massachusetts has not prohibited drug testing outright; in the commonwealth there is no barrier to a person's free and voluntary agreement to be tested. By the same token, neither Massachusetts' constitution nor its statutory scheme accomplish proscription by indirection." 863 F.2d at 115. Only after concluding that drug testing was legal in Massachusetts did the First Circuit hold that the privacy rights lawsuit was preempted. Thus, the *Jackson* case is easily distinguishable because the employer's conduct was not illegal. Indeed, even within the First Circuit (which decided *Jackson*), there are published cases holding that the LMRA does not preempt state lawsuits alleging illegal conduct by an employer. *See Ralph v. Lucent*, 135 F.2d 166 (1st Cir. 1998)

Petitioner's claim of conflict between the circuits simply does not hold up to scrutiny. Each of the cases cited by Petitioner is distinguishable from the present case because each of the cases relied upon by Petitioner arises out of an employer's conduct that is legal under state law. *See, e.g., Clark v. Newport News Shipbuilding, supra.*, ["Appellant cites to no independent state law or policy regarding drug testing . . ."] As such, there is no conflict between the circuits that would require this Court to grant Certiorari.

CONCLUSION

For the foregoing reasons, Respondents submit that the Petition for Writ of Certiorari should be denied.

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